No. 3070

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), owner of the steam tugs "DAUNTLESS" and "HERCULES",

Appellant,

vs.

HAMMOND LUMBER COMPANY (a corporation),

Appellee.

In the Matter of the Petition of Shipowners and Merchants Tugboat Company (a corporation), owner of the steam tugs "Dauntless" and "Hercules", for Limitation of Liability (U. S. District Court, District of Oregon).

BRIEF ON BEHALF OF HAMMOND LUMBER COMPANY, CLAIMANT BELOW, APPELLEE.

W. S. BURNETT,
WILLIAM DENMAN,
G. C. FULTON,
Proctors for Appellee.

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Statement of the Case.

A concise history of this prolonged litigation is set forth in the statement of facts made by Mr. Justice Gilbert in the opinion filed in the proceeding before this

court, wherein Hammond Lumber Company, appellee herein, sought a writ of prohibition against the Judges of the United States District Court for the District of Oregon, to restrain them from further entertaining the very proceeding from which the present appeal has been prosecuted by Shipowners and Merchants Tugboat Company. We refer to that statement of facts. It will be found in 240 Fed. 924 *sub nom. Hammond Lumber Company v. United States District Court for the District of Oregon et al.* Before the court in the prohibition proceeding, annexed to the petition for the writ, were copies of the petition for limitation of the Tugboat Company and the exceptions and claim and answer of the Lumber Company. The present appeal is from the decree of the said District Court sustaining said exceptions, granting the motion of the Lumber Company to dismiss and dismissing the limitation proceeding (Tr. 88, 89).

The motion of the Lumber Company was in the alternative (Tr. 59)—either (a) for dissolution of the injunction theretofore issued against it and the Circuit Court of Clatsop County, Oregon, or (b) in the alternative for dismissal of the petition for limitation as to said Lumber Company, or (c) *in toto.*

As already noted, the court adopted the alternative last mentioned and dismissed the petition *in toto* (Tr. 86).

The motion to dismiss (Tr. 59) supplemented the exceptions (Tr. 28), the latter, of course, being limited in their scope to the allegations contained in the petition for limitation. At the time the exceptions were

filed, the time had not elapsed within which claims might be seasonably filed. When the motion was made, such time had expired and as no other claims than that of the Lumber Company had been filed this was made the first ground of the motion (Tr. 60).

The petition for limitation had omitted to refer to the fact that in the California limitation proceeding the court had required the filing of bonds in the aggregate sum of $115,000.00, and had required by its order that said bonds carry interest from the date of the disaster, namely, September 9, 1911. These facts were also embodied in the motion, it having been set up in the answer (Tr. 43, 44) and which answer it was noticed would be used upon the motion (Tr. 64).

The motion also set forth in greater detail the California limitation proceeding, incorporating in the moving papers as Exhibit A to the affidavit of the Lumber Company the interlocutory decree of default (Tr. 72-75); and as Exhibit B thereto the opinion of Judge Dooling dismissing the proceedings as to the Lumber Company, but retaining jurisdiction of the proceedings for the protection of the Tugboat Company against any other possible claims (Tr. 76-80), and as Exhibit C thereto the decree of Judge Dooling ordering the dismissal of the proceeding as to the Lumber Company, but expressly providing that such dismissal should in nowise affect the rights of the Tugboat Company, if any, against any other persons entitled to file claims in said proceeding, if any there should be (Tr. 80-81) and as Exhibit D thereto a copy of the dismissal of the California limitation proceeding filed August 2,

1916, after the institution of the limitation proceeding in Oregon, in which the proctors for the Tugboat Company dismissed said California limitation proceeding and the court made an order thereon dismissing such proceeding (Tr. 81-82).

The motion to dismiss set forth as Exhibit E to the affidavit of said Lumber Company, upon which said motion was in part based, the entire portion of the brief of the Lumber Company filed in the State court, from which the Tugboat Company had elaborated its contention that a claim had been made in the said cause last mentioned by the Lumber Company for a total recovery of $111,153.22, with interest from September 9, 1911, at 6% per annum (Tr. 82-85). The motion further set forth the fact that no claim for anything in excess of $110,983.13, the amount demanded in the amended complaint in the State court, had ever been demanded by the Lumber Company of the Tugboat Company and attached as Exhibit 1 to said motion the affidavit of the Lumber Company, which in paragraph 2 thereof (Tr. 68-70) sets forth that it was never at any time the intention of the Lumber Company to demand in excess of the sum of $110,983.13.

Finally the motion was made upon the further ground (Tr. p. 63-64, par. 8) that the Lumber Company, at the suggestion of the Tugboat Company, had stipulated in open court, in the said action in the Circuit Court of Clatsop County, Oregon, that the trial of said action before a jury should be waived and should be before and by the court without the intervention of a jury and that in pursuance of such stipulation and

waiver so made, it was ordered by said court that the cause should be tried and the said cause was in fact tried by the court without the intervention of a jury and that by reason of the premises the Tugboat Company had voluntarily submitted itself in relation to the matters arising or to arise in said action in said Circuit Court for decision and adjudication by said court and had waived its right, if any it otherwise had, to require the Lumber Company to litigate its claim in any other court, or in any other proceeding. This fact was attested to by paragraph 3 of the affidavit of the Lumber Company upon which the motion was in part based (Tr. 70-71).

No affidavits or testimony were filed or offered by Tugboat Company in opposition to the said motion of Lumber Company, so that there was no question of conflict in fact for Judge Bean, who heard the motion, to decide.

Upon the hearing of the motion, the Tugboat Company moved the court to strike from the cause the said motion of the Lumber Company upon the ground that said motion came too late in the proceeding (Statement of Clerk, Tr. p. 6). In his opinion Judge Bean in disposing of the objections to the hearing of the motion thus interposed by the Tugboat Company (Tr. 86) said:

> "Objections to the consideration of the motion to dissolve the injunction and dismiss the proceedings will be overruled. The motion goes to the jurisdiction of the court over the subject matter and was not waived by a general appearance."

It should be noted that no error is assigned by appellant upon Judge Bean's ruling last mentioned.

It is our contention that Judge Bean's decree dismissing the limitation proceeding was correct, not only on the grounds specified in his memorandum opinion, but on the other grounds stated in our motion and exceptions, upon each and all of which we now rely. We shall argue herein that in the first place, as held by Judge Bean, no claim has ever at any time been made by Hammond Lumber Company in excess of the amount demanded in its second amended complaint in the State court, to wit: the sum of $110,983.13; that if in fact a claim greater in amount than $115,000.00 has been made by the Lumber Company, that the excess of such claim over said sum of $110,983.13 is for interest accruing on that amount since the date of the creation of that claim, to wit: the date of the disaster, September 9, 1911, and that for the purpose of determining the amount of the claim or claims in a limitation of liability proceeding under the Revised Statutes, in contrast with the amount of the fund, that is to say, the value of the vessel and her freight pending at the time of the disaster, the item of subsequently accruing interest should be ignored—in other words, that the limitation of liability proceeding speaks both as to the value of the *res* and the amount of the claim against the *res,* as of the date of the disaster. We further take the position that if interest arising on claims subsequent to the disaster is to be thus considered, then at least as a matter of discretion, if not otherwise, the value of the *res* should be considered as potentially, if not in fact, carrying a liability (which

may or may not be enforced) for interest. Furthermore, we insist, as Judge Bean held, that the pending limitation of liability proceeding in the Northern District of California, was the proper and only forum and proceeding in which the Tugboat Company could have asserted the rights, if any it had, arising from the making of this alleged claim by Hammond Lumber Company in excess of the value of the *res*. Finally, we submit, for this court's consideration, the question whether this court has jurisdiction to entertain an appeal which presents solely for determination the denial by the United States District Court for the District of Oregon of its jurisdiction to entertain and determine the said limitation of liability proceeding, from the decree dismissing which this appeal is prosecuted. The matter of jurisdiction should logically receive attention at our hands before giving consideration to the merits so called, but inasmuch as we conceive the jurisdictional question is not easy of solution and as its elucidation will come from a consideration of the other matters, we will discuss them first.

At the outset it seems to us there is a question more fundamental than that involved in the "accident", as our opponent would have it, which resulted in the giving of bonds in the California limitation proceeding, which carried interest from the date of the disaster, or the fact (which was no "accident" as far as our opponent is concerned) that the bonds required by Judge Wolverton in the Oregon limitation proceeding did not carry interest.

Considering the question fundamentally, we have to go back of the bond, examine the Revised Statutes, and

determine whether or not, as a matter of substantive law, it was intended to exonerate a shipowner for liability (which might or might not be enforced) for interest on the amount of the claims or claim as determined and limited under said statutes, and in this behalf we contend:

I.

THE REVISED STATUTES OF THE UNITED STATES PROVIDING FOR LIMITATION OF LIABILITY, DO NOT EXONERATE A SHIPOWNER ENTITLED TO THEIR BENEFIT FROM LIABILITY (WHICH MAY OR MAY NOT BE ENFORCED) FOR INTEREST ON THE AMOUNT OF THE CLAIM OR CLAIMS AS SCALED DOWN OR LIMITED BY THE OPERATION OF SUCH STATUTES.

What we have in mind is illustrated by the case of

In re Starin, 124 Fed. 101.

Where the liability of the surety on the bond was limited to his undertaking (which did not provide interest) it was held that while there could not be any recovery against the surety in excess of its contract liability, nevertheless a decree should be awarded against the shipowner for the value of the vessel, plus interest from the date of the disaster.

So far as the writer can find, the only decision of the Supreme Court of the United States on this question is that of

Dyer v. National Steam Navigation Company, decided May 10, 1886; 30 L. ed. p. 153; 118 U. S. 507, Sub nom. "The Scotland".

This case had at an earlier time been before the

Supreme Court. See *The Scotland*, 105 U. S. 241 (26 L. ed. 1001).

This was not a case where there was a proceeding taken to limit liability and a concourse had of the various damage claimants, but the limitation of liability statute was pleaded as a defense. The finding of the lower court based on the report of the Commissioner was that the amount realized from the strippings of "The Scotland" was $4927.85. The great question in the case was, whether insurance received by the owners of the "Scotland" should be added to the fund. The trial court held the proper amount to be paid by the owners of the vessel, as depending upon the value of the articles saved, was said sum of $4927.85 only, and the trial court entered a decree that the owner pay into the registry of the court the said sum of $4927.85 and the sum of $2173.10, the costs of the libelants in the District Court and the costs in the Circuit Court and that upon such payment the respondent should be discharged from all liability to the libelants and intervenors.

The libelants excepted to the findings of fact and conclusions of law of the Circuit Court among other grounds on the one that interest should have been allowed on said sum of $4927.85.

Mr. Justice Bradley, delivering the opinion of the court (four Justices dissenting and referring to their dissenting opinion in the case of *Place v. Norwich & New York Transportation Company*, also known as the "City of Norwich", which has to do with the ques-

tion as to whether or not insurance should be included in the fund) said:

> "These points are all disposed of in the previous case of Place v. National Steam Navigation Company, except the question of interest. *Were the libelants entitled to interest on the amount received from the strippings? In answering this question it must be borne in mind that this is not a question of debt, but of damages. The limitation of those damages to the value of the ship does not make them cease to be damages.* The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury. The record now laid before us contains no part of the pleadings or proceedings in the cause prior to the first decree of the circuit court. We are without any means of knowing the circumstances in the pleadings or the evidence upon which the court was called upon to act, except the bare facts stated in the finding of facts before referred to. The right to a limitation of liability seems to have been denied to the respondent from the beginning. If it offered to pay the value of the strippings into court in its discharge from liability, or desired to do so, it is evident that the court would not allow it to do so, and that the libelants resisted it with all their power. The respondent was obliged to wait until the decision of this court in March, 1882, before getting a declaration of its rights in the matter; and the first move afterwards made was the attempt of the libelants to change the whole form of the controversy by setting up the new claim to the insurance money received by the respondent. Without stopping to decide whether this amendment of the proceedings was lawfully allowed after the decision of this court, it is sufficient to say that the circuit court, so far as we have anything before us to show to the contrary, may have had very good reasons for not allowing interest on the value of the strippings. We are not disposed to disturb its decree in this respect." (The italics are our own.)

The statutory basis for the right of a shipowner to limit his liability is found in

R. S., Sec. 4283,

which reads as follows:

> "The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, lost, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

It is to be noted in the case last cited, Mr. Justice Bradley squarely holds that the statute does not relieve the shipowner from paying interest *upon and in addition to the value of the vessel,* though he upheld the exercise by the trial court of its discretion in not allowing such interest.

The silence in the Admiralty Rules in the Supreme Court—Admiralty Rules, 54-58—on the question of interest can now be readily understood in the light of this decision. As Mr. Justice Bradley says:

> *"The limitation of these damages to the value of the ship does not make them cease to be damages."*

The vessel and her freight pending is valued as of the close of the voyage, and to this value, as of the close of the voyage, the liability of the owner is limited, but, as the decision says, plus interest, if the court sees fit to allow interest. This case clearly demonstrates that it was never intended that a shipowner should remain supine for four or five years, then surrender

his vessel and thereby escape the payment of interest, though, as this case also shows, it may be a proper exercise of discretion for the court to withhold interest. As the liability is for interest upon the damages as damages (though the damages may be limited to a certain fund or amount), it follows that the date when the damages accrued (the day of the disaster, or close of the voyage, for the purpose of computing the pending freight) is the date from which the interest can be made to run. The whole course of the opinion shows that the question in the court's mind was not as to the date from which the interest should run, but as to whether interest should have been allowed at all in the discretion of the trial court.

From this viewpoint, it will be appreciated that it makes but little substantial difference whether or not the bond carries interest. Liability for interest exists independently of the bond. The bond merely evidences the already existing liability of the shipowner to pay interest, and creates a contractual liability on the part of the surety to pay that interest—should interest be awarded.

In re Starin, 124 Fed. 101, supra, exemplifies this.

Nor, as necessarily follows from *In re Starin,* supra, is the acceptance of a bond failing to provide for interest an exercise by the court of its discretion as to whether the shipowner shall be relieved of its liability to pay interest.

As the question as to whether the shipowner's liability to pay interest will be enforced in any given case

is one of discretion—naturally, that discretion is best exercised upon or after the trial and not before it.

cf. *The Perry G. Walker*, 216 Fed. 423.

It is, of course, sound practice for courts to require that the stipulation should carry interest from the close of the voyage (as the rules of the Southern and Eastern Districts of New York require (infra) unless it is specially ordered to the contrary) for then there is security to satisfy the interest, if it be awarded.

But the point we are making is that the liability (which may or may not be enforced) for interest exists irrespective of the bond, and if the bond does not provide for interest, or only does so from the date of its filing, that matters not so far as the jurisdiction of this court is concerned. The shipowner is liable or possibly liable for interest from the date the damages accrue.

These considerations are not affected by the fact in this case that Hammond Lumber Company has chosen to assert its claim in the State courts of Oregon, under whose statutes interest is not recoverable in such a case. Had the claim been presented in the U. S. District Court either in a limitation of liability proceeding, or in an independent libel, interest would have been recoverable in the discretion of the court from the date of the disaster. Therefore, it follows that from the standpoint of the shipowner, upon whom the statutes confer the right to limit liability, there is always, as the Revised Statutes have been thus construed, a liability, or possible liability (which may or may not be enforced) on his part to pay interest on the

amount of claims as they may be scaled down and limited by the operation of such statutes and it was not the intention of Congress to add to the exceedingly generous treatment accorded shipowners by exonerating the shipowner from his possible liability for interest on the amount of the claim, or claims, as limited. A further development of these thoughts and consideration of decisions in connection with the allowance of interest on the fund in limitation proceedings, will be postponed until we discuss the proposition leading to the result that if interest is to be deemed a part of the claim for the purpose of increasing the amount of the claim, then interest on the fund must or should be considered for the purpose of increasing the fund. We submit, however, that the decision of the Supreme Court of the United States in *Dyer v. National Steam Navigation Company,* supra, discussed in this topic, once and for all refutes the contention of our opponent that the shipowner is entitled under the provisions of the Revised Statutes to exoneration from liability (which may or may not be enforced) for interest from the date of the disaster on the amount of damage claims as thus scaled down and limited. We say this decision is inconsistent with our opponent's contention to the effect that the District Court is powerless under said Revised Statutes and the Admiralty Rules enacted in pursuance of them, to require the shipowner to pay interest on the value of the *res,* or more accurately speaking on the amount of damage claims as limited to the value of the *res,* prior to the time of the commencement of his limitation of liability proceeding.

II.

THE JURISDICTION FOR THE LIMITATION OF LIABILITY FOR A SINGLE CLAIM DEPENDS ON THE RELATIVE SIZE OF THE CLAIM AND THE FUND AT THE END OF THE VOYAGE AND THE INTEREST ON NEITHER SHOULD BE CONSIDERED.

It appears from the petition in the second limitation proceeding in Portland that the principal sum of the claim for damages as finally alleged by the Hammond Lumber Company, in its suit in Clatsop County, is $110,983.13 (or say $111,153.92) as of September 9, 1911, the day on which it was sustained. The petition also shows that the value of the fund consisting of the two tugs is $115,000.00 as of that date.

It is admitted that no other claims were alleged in the second petition to exist, or were filed in that proceeding. It follows that the fund, which, under the decisions of this court must be computed as of the date of the ending of the voyage caused by the disaster, is greater than the damage occasioned by the disaster. The petition therefore, fails to show on its face the presence of jurisdiction for the proceeding, and affirmatively shows the absence of jurisdiction.

The argument that the jurisdiction of the court, so far as it is dependent on the claim exceeding the fund, rests on the state of affairs when the petition for limitation is filed, instead of the time of the disaster, produces several absurdities.

In this case, if the petition for limitation had been filed a month after the disaster and a bond for $115,000.00, with interest from the date of filing, had

been given, and the Lumber Company had filed its claim for $111,153.92 and interest for one month, the fund would have exceeded the claim and the jurisdiction would not have existed.

If, however, the petitioner chose to delay filing his petition for limitation for a period of three years, and had then given a bond of $115,000.00, with interest from the date of filing, and the Lumber Company's claim for $111,153.92 and interest from the date of the disaster amounted, principal and interest, to $143,306.96, the claim would exceed the fund and the court would have jurisdiction for limitation. In other words, the petitioner, by his choice of time for filing his limitation proceeding would determine whether or not the court had jurisdiction to limit liability.

Or, take another case: Presume that the fund is $115,000.00 and interest runs on it at the admiralty rate of six per cent, from the date of the disaster (as it properly should), and suppose that the interest on the damages in a suit brought in the State court runs at the rate of 8 per cent from the same date. Presume that the State court suit goes to judgment at the end of three years for the amount of the claim in the complaint, $111,153.92, plus interest at 8 per cent. Presume that the Tugboat Company then (as under the decisions it may) files its proceeding for limitation and gives its bond for $115,000.00, plus interest for three years at 6 per cent. By waiting until the State rate of interest has outrun the admiralty rate sufficiently to make the claim and interest exceed the fund and interest, the petitioner is able to invoke the jurisdiction

for limitation of liability, although it did not exist for over two years after the disaster.

Such a "now-you-see-it and now-you-don't" method of determining jurisdiction must be abhorent to the court, and the result is equally unjust and senseless, whether the interest on the bond is computed from the day of its filing or from the day of the disaster.

As we show elsewhere in this brief, the interest on the fund, if not from the date of the disaster, is within the discretion of the court. It is quite apparent that this power as to interest, if discretionary, may be exercised by the judge of one district in one way and by another in another. If counsel's contention be correct and interest is to be considered in determining whether the court has jurisdiction, the jurisdiction may exist in one district and not exist in another, all within the discretionary action of the judges of the two districts.

The only sound test is whether the principal sum of the claim, as of the date of the disaster terminating the voyage, exceeds the value of the fund as of the same date. Even in the absence of those decisions of this court which hold that the fund must be computed on the valuation of the vessels at the date of the disaster, the principle we contend for is clear.

These decisions establish that the valuation of the *res* for purposes of determining the fund for limitation is to be as at the moment of the disaster terminating the voyage. In each of them the voyage terminated at a distance from the port of ultimate salvage, in one case the vessel being lodged on a rocky point and in the other lying water-logged many miles from shore

in the open sea. In both cases the vessels were finally salved and brought to port, and in each the measure of damage was the salved value minus the cost of salvage and minus the risk that the salvage operations would not be successful at all. In other words, the appraisement was to determine, and did determine the value at the moment of the termination of the voyage by the disaster and at the point of its termination.

Pacific Coast Co. v. Reynolds, 114 Fed. 877;
Boston Insurance Co. v. Metropolitan Redwood Lumber Company, 197 Fed. 703.

It certainly enhances the absurdity of the Tugboat Company's contention that the interest on the fund does not run till the filing of the stipulation when we consider that the fund which is to bear the interest is thus valued as at the termination of the voyage.

III.

THE QUESTION OF INTEREST ON THE FUND IS IRRELEVANT IN DETERMINING JURISDICTION, BUT IF IT WERE THE COURT SHOULD ALLOW THE SUBSTITUTION OF A BOND FOR THE VESSEL ONLY ON THE TERMS OF INCLUDING INTEREST FROM THE END OF THE VOYAGE.

We have shown in our last section that the jurisdiction for limitation should not depend on the allowance or disallowance of interest on the fund. We there suggested that if we do regard the interest as part of the fund in comparing it with the claim, absurd anomalies may arise if the allowance of such interest be discretionary. If discretionary, the court may find, after

all the issues are tried and the facts finally disclosed upon which its discretion shall rest, that interest should be allowed from a date which will make the fund exceed the claim, and the jurisdiction shown not to exist. In other words, the court may lift itself out of its own jurisdiction with its own bootstraps.

The authorities referred to by our opponent are practically conclusive to the effect that the time for which interest should run is a matter of the court's discretion. They certainly do not show it to be the law that the interest *must* run from the time of the filing of the bond, for six of the cases there cited allow interest for other periods or not at all. In fact the Supreme Court has squarely decided that the allowance of interest on the fund is a matter of the trial court's discretion.

The Maggie Smith, 123 U. S. 349 at 356.

In the greatest of the admiralty courts in the United States—those of the southern and easterly districts of New York, this discretionary power has been codified in a rule and that rule provides that the interest *shall run from the end of the voyage.*

> "76. The stipulation for value upon such appraisement shall be given with sufficient sureties and upon justification as required under these rules in actions *in rem,* and shall provide for the payment of the appraised amount *with interest from the close of the voyage,* unless otherwise ordered by the court."

Benedict's Admiralty, 4th ed., page 462;

Benedict's Admiralty, 4th ed., Form of Order for Bond, page 687.

The Tugboat Company has said it knows of only one "reported" case in which interest is allowed from the conclusion of the voyage. In this it is mistaken, however, for in the important case of the San Pedro limitation decided by this court, and in which a member of one of the firms representing the Tugboat Company filed the bond, interest ran on the fund from the date of the disaster and was so reported.

Boston Ins. Co. v. Metropolitan Co., (C. A. A. 9th) 197 Fed. 706.

The end of the voyage has been a favorite time from which to assign the running of interest on the bond.

In the *Acapulco Limitation,* No. 13,784 in the Northern District of California, Judge de Haven, by his order, allowed interest on the bond from the end of the voyage. Later, on the hearing on the final decree, the petitioner objected to this allowance of interest and urged that it run for a shorter period, and the point was fully briefed and argued. Judge Dooling sustained the ruling of Judge de Haven, and the interest was allowed from the earlier date.

In the following limitation proceedings in the Northern District of California, the fund bore interest from the end of the voyage. In each of them the record shows some of our learned opponents participated:

Santa Rosa Limitation, Northern Dist. Cal. No. 15,289;

In re Western Fuel Co., Northern Dist. Cal. No. 13,782;

In re Pacific Coast SS. Co., Northern Dist. Cal. No. 13,787.

No doubt there are other similar cases.

There is above all the precedent in the instant case. It may be that when the Tugboat Company prepared its bond and the order for the court, which the court made requiring a bond which carried interest from the date of the disaster, it did so without giving any particular thought to what may have been the proper practice in the premises, but we submit in view of the court rule prevailing in the maritime districts of the State of New York and with plenty of local precedents in the United States District Court for the Northern District of California in accord therewith, it can hardly be said that the fact that this provision was made for interest was but an accident.

These cases make obvious, what the Tugboat Company had failed to clarify, why it was straining to have the Oregon District Court take jurisdiction. It wanted a chance to persuade Judge Wolverton to make the interest run from the date of the bond and not from the end of the voyage—an uninterrupted chance, *ex parte*. It seems improbable that neither these California cases, nor the New York rule, were cited to the Judge, for he certainly would have desired the affected party to be heard before invoking the statutory injunction.

This is the only instance in the experience of any of those in this brief in which an appraisement for the bond, which ousts the State court, has been had *ex parte,* where there are known claimants. The rules of the Northern District of California codify the long settled

practice that notice of the appraisement shall be given to the known claimants.

> "If, instead of a surrender of the vessel, an appraisement thereof be sought for the purpose of giving a stipulation for value, the libel or petition must state the names and addresses of the principal creditors and lienors, whether on contract or in tort, upon the voyage on which the claims are sought to be limited, and the amounts of their claims, so far as they are known to the petitioner, and the attorneys or proctors in any suits thereon; or if such creditors or lienors be numerous, then a sufficient number of them properly to represent all in the appraisement, and notice of the proceedings to appraise the property shall be given to such creditors as the court shall direct, *and to all the attorneys and proctors in such pending suits.*" (Italics ours.)
>
> *United States District Court Rules,* No. 53.

Such notice is required under the practice as set forth in Benedict.

Benedict's Admiralty, 3rd ed., page 343.

It was required by the same rule in the southern and eastern districts of New York.

Benedict's Admiralty, 4th ed., Rule 75, page 462.

In *Smith v. Booth,* 112 Fed. 553, interest was allowed on the value of the vessel from the date of the disaster.

> "In The Favorite (D. C.), 12 Fed. 213, Judge Blodgett held that the owners might, irrespective of any prior order or stipulation, be required to pay interest upon the value of the vessel from the date of collision, the decree going against the owners and their surety in the stipulation for the value only, there being no provision binding the surety to pay interest before default. * * * Their liability was for the value of the vessel at the time of the collision. Why shall they be allowed the use of that value during a protracted litigation carried on by themselves? The justice of the matter was that the *value at*

the date of collision should be made productive." (Italics ours.)

The George W. Roby, 111 Fed. 601 at 622.

This we think embodies the true principle and evidently the one at the basis of the rule in New York and California. The owner has the use of the vessel and her earned freight from the end of the voyage. He should not be permitted to earn money with the ship and interest on his collected freight moneys and at the same time be allowed (as he is) to delay till the claims have been litigated through the Supreme Court of the United States before commencing his limitation proceedings, and then be permitted to give a bond without interest for this period.

Such a practice is merely putting a premium on delay. Great shipping companies wait till their shippers and passengers or their surviving heirs have almost litigated their claims in the State court and then compel them to try them over again in the limitation proceeding. The result is that poor passengers or their survivors and smaller shippers offer to accept almost any terms rather than face the expense of counsel, the costs and the uncertainties in the double litigation.

It is true that the statute allows the vessels to be surrendered perhaps years after, and it may be that if the vessel is substantially the same with mere ordinary deterioration, the owner need give no more than a bill of sale of her to the trustees. But when the court "acting in equity in admiralty" created an alternative remedy for the surrender, it certainly did so with the

thought that it would exercise the equitable discretionary power as to interest, always a prerogative of the admiralty judge, to prevent any injustice which actual application of the statute might develop. It is a proper term or condition for the granting of the right to keep the vessel and substitute a bond that the bond shall bear interest for the time the owner, by delaying the proceeding has had the use of his freight money and his ship. The court has imposed the costs of the enjoined state proceedings as the terms for allowing a petition to be filed after long delay and the same equitable principle applies to interest.

The S. A. McCaulley, 99 Fed. 302.

If our opponent's contention be correct, and it is the state of affairs at the time of the surrender which controls and not that at the end of the voyage, then the tugs should have been appraised as at that date, and we should have had the benefit of the great rise in shipping values during the war. It is entirely conceivable that these two tugs, if they had been appraised as on the date from which the interest on their value runs, i. e., July 20, 1916, would have been proved worth $200,000.

Can it be that this was the reason we were given no notice of the appraisement in violation of the long established practice and despite the fact that on the result of that appraisement was determined the question whether or not a State court should be enjoined?

If this was the reason, it was a wrong one, for this court has held in two cases that it is the condition of affairs at the end of the voyage which determines the value of the vessels. These decisions are the more

striking because in each a deduction from the salved value was made for the risk that the damaged vessels might not be salved at all, and this after the deduction for the actual cost of salvage had been made.

Pac. Coast Co. v. Reynolds, 114 Fed. 877;
Boston Ins. Co. v. Metropolitan, 197 Fed. 703.

Every argument of justice and good conscience supports the better California practice and New York rule, and the action of the District Court of California in the first proceeding, in exercising its discretion and allowing interest from the end of the voyage. *But can it be that the court's jurisdiction to enjoin a State tribunal is dependent on such an uncertain and discretionary determination as that of interest on this fund?*

We submit that it is not, and that upon this reasoning, as well as the showing of the other anomalies heretofore in this brief, the jurisdiction must be determined by the relative size of the claim, without interest, to the fund, without interest.

IV.

HAMMOND LUMBER COMPANY HAS NEVER MADE A CLAIM AGAINST THE TUGBOAT COMPANY IN EXCESS OF $110,983.13.

In the foregoing argument up to this point, we have assumed that Hammond Lumber Company, through the language used in its brief filed in the State court, had definitely and unequivocally put forward a claim or demand for a sum in excess of $110,983.13, and we

have striven to show that as such excess over the fund of $115,000.00 was made up of interest accruing subsequent to the claim, that for the purpose of determining the jurisdiction of the District Court to entertain the proceeding, the amount of the claim thus made up of interest should be disregarded. In this article we contend that Judge Bean correctly decided that Hammond Lumber Company never made a claim in excess of $110,983.13.

When a controversy has reached the stage of litigation, the pleadings furnish the criterion of the amount of the recovery sought.

It is not pretended that we have at any time in our pleadings prayed or demanded a greater sum than $110,983.13.

It is argued by the Tugboat Company, since in our discussion in our brief in the State court under the caption of "The Value of the Raft", which entire matter is attached as Exhibit "E" to the affidavit of the Lumber Company used on the motion (Tr. 82-85), we have stated that to such value interest "should be added" that we have *demanded* such interest, even though if it were awarded, the result might be a judgment in excess of the amount of the recovery as limited in our complaint.

It is argued by the Tugboat Company (citing the case of *Rutenic v. Hamaker*, 40 Or. 444; 67 Pac. 192) that the court has power to award interest even though we have not demanded or prayed for it. This seems to prove too much. If that decision be applicable at all

to the case at bar, it seems that our remark in our brief concerning interest bears no causal relation whatsoever to the alleged threatened exercise of the power of the court in awarding interest so as to sanction a recovery in excess of the amount as limited and defined in our pleading, namely, $110,983.13.

The remark that we "should" have interest falls far short of the dignity of a demand for same. It simply means that to afford the Lumber Company indemnity, it "ought" to have interest. Nevertheless, we are satisfied that under the statutes of Oregon, we are not entitled to interest. But even had we gone further and said we are entitled to interest under the law of Oregon, but we do not ask for it, that would not amount to a claim for interest or demand for interest, and if there be any ambiguity in the remark in our brief, our failure to amend, or seek to amend the complaint, in this respect, resolves that ambiguity.

Again, if there be ambiguity in our remark, we have the affidavit of the Lumber Company on this motion (Tr. 69-70) to the effect that it has never intended to demand, or has demanded, any sum in excess of $110,983.13, and that it thereby disclaims its right, if any it ever had, to such interest.

Again, if there be ambiguity in our remark, on what just principle should that ambiguity be construed so as to bring about a result which the law will not contemplate was intended by the Hammon Lumber Company? Is it to be presumed particularly against its sworn assertion to the contrary, that the Lumber Company intended to do that which our opponents declare

would defeat the jurisdiction of the court in a case which it instituted and which forum it selected, and the trial of which occupied some three weeks' time—twelve actual trial days? All rules of construction would favor resolving the ambiguity (if such it be) in a manner which would sustain and not defeat the court's jurisdiction. As a matter of construction, it is never presumed that either legislators or courts intend that which contravenes the inherent limitations imposed upon such bodies, and it will not be presumed that a plaintiff litigant intends to do that which throws him out of court. The presumption will be the other way.

Furthermore, is it to be presumed that the Circuit Court of Clatsop County will voluntarily and gratuitously, so far as the Lumber Company is concerned, defeat its own jurisdiction by imposing upon the Lumber Company unasked and unsought a greater recovery than that demanded in the complaint?

The case of *Rutenic v. Hamaker,* 40 Or. 444; 67 Pac. 192, has no application to the situation presented in the case at bar.

This was an action upon an administrator's bond, and the court found, to use the words of L. O. L., Sec. 6028, allowing interest, "that money had been received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied"—a clear case for the recovery of interest as such and as an incident upon the principal amount demanded. The Supreme Court of Oregon affirmed

the action of the trial court in allowing interest on such money so retained, though it was not demanded in the complaint.

The case is inapplicable for two reasons:

(1) If the Lumber Company were entitled to interest in the case at bar, it would not be to interest *as such,* but as an element in the assessing of the entire damages which are limited by the complaint to the sum of $110,983.13.

(2) Apart from this distinction between interest *eo nomine* recoverable as an incident under the statute, and interest as an element in a measure of damages, the situation must be such as to *entitle* the plaintiff to interest before the court is authorized to grant it.

In a word, it will not be presumed that the court will grant the plaintiff something which it does not ask and to which it is not entitled under the law.

Both these propositions are illustrated in the case of *Sargent v. American Bank & Trust Co.,* 80 Or. 16-38; 156 Pac. 431-433.

It is there said:

> "It is true that interest may sometimes be allowed as damages (citing Oregon cases, among them the cases in conversion of Durham v. Commercial National Bank, 45 Or. 385-89; 77 Pac. 902, and Eldridge v. Hoefer, 45 Or. 239-244; 77 Pa. 874) * * * The right to recover interest *eo nomine* must, in the absence of an agreement to pay interest, be found in the statute which confers it, and unless it is included, it must be deemed to be excluded."

It is manifest that interest *eo nomine* is not recoverable in the case at bar. The situation presented is not one of those provided by statute. Nor is it recoverable as a component element in a measure of damages under the more recent decisions of the Oregon Supreme Court, owing to the unliquidated and very much controverted character of the demand.

Smith v. Turner, 33 Or. 379; 54 Pac. 166;
Baker County v. Huntington, 48 Or. 593-603; 87 Pac. 1036; 89 Pac. 194;
Hayden v. City of Astoria (May 1, 1917), 164 Pac. 729.

And if it were recoverable as a component element in a measure of damages, the measure of damages we seek to have applied is defined and limited in our complaint to the sum of $110,983.13—a very different proposition from that where the allowance of interest is a statutory right—a mere matter of arithmetic—which can be readily added to the amount of the demand.

In one case it is a demand which may contain within it the element of interest. In the other case, it is the demand plus interest as an incident added thereto.

V.

THE PENDENCY OF THE FIRST LIMITATION PROCEEDING LEAVES NO JURISDICTION IN ANY COURT FOR A SECOND LIMITATION PROCEEDING. THE LAW CONTEMPLATES BUT ONE LIMITATION PROCEEDING.

The petition in the second limitation proceeding in Portland shows that at the time it was filed there was

pending in the District Court for the Northern District of California, in San Francisco, a first limitation proceeding, in which the same fund had been surrendered, and in which the petitioner sought a concourse of claims and a marshaling of assets for the same disaster.

In this first proceeding a decree entered a default against other possible claimants, such as fishermen whose nets had been torn by the loosened logs of the rafts, and owners of smaller or larger craft which might have been injured by such logs of the raft. The order did no more than enter the default (Tr. 71-75).

Judge Dooling's opinion (Tr. 76-80), which in admiralty is to be read with the decree, provided that:

> "The court, however, will retain jurisdiction of the proceedings for the protection of petitioner against any other possible claimants."

In this the case differs from *Dowdell v. District Court,* 139 Fed, 444, where the court held that the decree *denying* a limitation ended the case.

The decree provided that the case should be dismissed as to the Hammond Lumber Company's claim, and added the following:

> "It is further ordered, adjudged and decreed that the above order and decree shall in no wise affect the rights of the petitioner here acquired, if any there be, against any other persons entitled to file claims herein, if any there be."
>
> (Tr. 80-81.)

The order for the default was described as "interlocutory" (page 71), a proper description in admiralty

as there must still be a hearing on the merits. Rule 29 of the Supreme Court provides as follows:

> "If the defendant shall omit or refuse due answer to the libel upon the return day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte* and adjudge therein as to law and justice shall appertain."

In his book on admiralty practice, commenting on Supreme Court Rule 29, Judge Conkling says:

> "This rule, it will be remarked, makes no distinction between the case of the defendant's nonappearance and that of his appearing and omitting or refusing to make due answer to the libel. In neither case, therefore, is the libelant allowed, in the language of the Court of Chancery, to take 'such decree as he can abide by'; but the court is to 'proceed to hear the cause *ex parte,* and judge therein as to law and justice shall appertain'."
>
> *2 Conkling U. S. Admiralty,* page 522.
>
> "It is the indispensable duty of the court to do this."
>
> *Id.,* page 523.

At the *ex parte* hearing, which, we see, *must* be had after default of claimants in any admiralty proceeding, the judge may draw from the managing owners on the stand, the fact that they were privy to, or had knowledge of the disaster, and hence are not entitled to limitation, or that there are just claims for damage upon which the court may decide against them; or it may appear from their testimony under the examination of the court that there was no privity and no knowledge and no claim.

Whether the final decree shall be for or against the petitioner is as uncertain before this *ex parte* hearing as the granting of a divorce is uncertain after the order defaulting an absent spouse.

Therefore it appears that the first limitation proceeding involving the same fund, the same concourse of claims, the same marshaling of assets as in the proceeding in Portland was pending when the latter was commenced, and the action here complained of was done by that court.

The Tugboat Company claims that there is an inconsistency between an argument in our brief on the appeal in the first suit, that the order entering the default against all other claims puts the petitioner for limitation in the same position as if the Statute of Limitations had passed on them, and our assertion here that the first limitation proceeding is still pending as to the world. This contention of ours must be considered from the viewpoint of the relationship of the Tugboat Company to the Lumber Company. It was made on an appeal where the only parties litigant were the Tugboat Company and the owner of the raft. For the purposes of limitation, *as to these two parties,* the action of the Tugboat Company in taking the default is an *admission* of the absence of other claimants, which would support the finding of the lower court and its decree in favor of the Lumber Company.

This is very far from saying that the Tugboat Company, by admitting a fact against itself and in favor of the Lumber Company in the jurisdictional contro-

versy between these two, can claim the benefit of the admission *in its favor* and *admit as against the other claimants* that they have no claims or that they shall take nothing by reason of their claims, or that there shall be a limitation as to them.

The question whether the limitation proceeding is still pending in the California District as to the *res* there held, and when the jurisdiction is expressly declared to be retained by the District Court, in spite of the dismissal as to the Lumber Company, cannot be settled by determining what was admitted or claimed between the Tugboat Company and the Lumber Company.

If the facts stated by the Tugboat Company really constitute a new cause of action, any admissions of the Tugboat Company in the first limitation proceeding should be considered when the matter is presented in that proceeding. It would be most extraordinary to hold that the first litigation of the Lumber Company's claim in admiralty did not preclude the consideration of a second claim, and then to hold that the dismissal of the first from the California limitation proceeding prevented the second consideration there.

The first limitation being still pending, the court in California had the exclusive jurisdiction of proceedings for a limitation of liability arising out of this disaster.

1. *In re Whitelaw,* 71 Fed. 733;
2. *Revised Statute,* 4285;
3. *Metropolitan Redwood Lbr. Co. v. Doe.* 223 U. S. 365 at 371 et seq.

Revised Statute 4285 provides that upon the transfer of the vessels to a trustee, all other proceedings shall cease, and this statutory injunction is operative without any writ from the court. The statutory injunction arises upon the giving of a bond as a substitute for the vessels.

Metropolitan Rdwd. Lbr. Co. v. Doe, 223 U. S. 365.

The reason for this ouster of these other courts was well stated by this court in the following language:

> "The clear meaning and purpose of the law was to fix and declare a certain limit of liability on the part of the shipowners, and to determine whether the vessel is liable at all in a single proceeding, and not to leave it to be litigated, and possibly determined, in different ways in different courts. The prosecution of separate suits, if allowed to proceed, would result in the subversion of the whole object and scheme of the statute."
>
> *Dowdell v. U. S. District Court* (C. C. A,), 139 Fed. 444 at 445.

If it be subversive of the act to allow the possibility of litigation of any issues arising out of the voyage in different courts in different ways, then *a fortiori* would it be improper to risk the limitation being denied in the California District Court and allowed by the District Court of Oregon.

If the second proceeding is valid, we have the amusing situation of the first proceeding ousting the second, and the second the first.

An examination of Rules 54, 55, 56 and 57 of the Supreme Court, controlling limitation of liability, shows clearly that but one limitation proceeding is contemplated.

The limitation proceeding pending in California was dismissed (Tr. 82) some days after the institution of the limitation proceeding in Oregon. We are told that this action was merely "for the sake of the record", which we suppose means that a proceeding which this court has held was improperly brought and prosecuted, but which nevertheless served to delay the assertion of the Lumber Company's rights for some three and a half years, should be given a decent burial. We are told that this California proceeding, thus brought to an untimely end, really amounted to nothing anyway, inasmuch as the Lumber Company had been dismissed out of it and a default had been taken against any other possible claimant. Therefore, the proceeding was dead, and the dismissal really was the funeral. If this were sound (which we do not think is the case, and we submit we have shown that the proceeding was very much pending and undertermined) it means that there had been an adjudication against other possible claimants, and it obviously follows that the Tugboat Company was without right to, and it may be doubted if the court had the power to, dismiss said proceeding. A judgment which one person obtains against another may be satisfied, but it never can be dismissed. In a word, we contend the limitation proceeding in California was pending when the limitation proceeding was brought in Oregon. The Tugboat Company contends that the proceeding had reached the stage of a final adjudication. If so, then it could not be dismissed. In any event, it will be conceded that what we have to concern ourselves with is the status of the proceed-

ing in California at the time of the institution of the proceeding in Oregon. We advance these considerations so that our opponent may take comfort from the thought that the result on the merits could not have been any different had he attempted to dismiss the California proceeding before instituting that in Oregon.

There is another reason which points to the necessity for the exclusiveness of the jurisdiction of the District Court which first takes hold of the subject matter. It seems to be conceded on all hands that the concurrent maintenance of proceedings to limit liability over the same subject matter in different districts is unthinkable—even to the point that an inanimate thing, such as "the record", should be cleared of the suspicion of participating in such a jumble. Let us assume, as might or may well be the case, that the default obtained against the damage claimants in the California proceeding is a valuable right. Let us assume, that the Lumber Company has brought forward a claim which, as of the date of the disaster, is admittedly and vastly in excess of the fund established in the California proceeding. Can it be that the Tugboat Company in order to litigate this claim, in a limitation proceeding, must dismiss the pending proceeding in which the defaults have been obtained? Obviously not, and such being the case it follows, as two concurrent limitation proceedings are unthinkable, that the bringing of the Lumber Company again into the pending limitation proceeding in California was the proper and exclusive remedy of the Tugboat Company, if it desire to assert its right to limitation through the

agency of an independent proceeding in the admiralty court.

In view of the exclusiveness of a proceeding to limit liability, as the one for the adjustment of all claims growing out of the disaster, as sustained by the authorities last cited, and further, having regard to the fact that the institution of such a proceeding and the surrender of the *res,* or its equivalent, the filing of a bond in place of such surrender, thus localizes and limits the litigation of all claims arising out of the disaster to the particular court in which that proceeding is pending and to that particular proceeding, it seems hardly necessary to invoke the principle of election as exercised by the petitioner in a limitation of liability proceeding, to retain for the court, whose aid he has invoked, exclusive jurisdiction over the proceeding thus instituted and the matters arising in it. Nevertheless, it is to be noted that under the Admiralty Rules the Tugboat Company was privileged in the first instance to have instituted its proceeding to limit liability in the United States District Court for the District of Oregon. Indeed this was the district above all others in which the Tugboat Company might most appropriately have proceeded. Its right to do so in California was under the facts in the case conditioned upon the presence within the jurisdiction of the two tugs at the time the petition was filed herein—while in Oregon there was jurisdiction by reason of the fact that the Lumber Company had brought its action in the courts of Oregon.

Benedict on Admiralty, 4th ed., Sec. 530;
In re Louisville, 223 Fed. 185.

Therefore, apart from the more far-reaching considerations already noted, it is obvious that upon the principle of election the Tugboat Company having invoked the jurisdiction of the United States District Court for the Northern District of California, must litigate everything that can be litigated concerning the disaster in that proceeding.

If it has the power to and does dismiss the proceeding in California then it simply means that it is out of court, for all time, so far as respects the maintenance of independent limitation proceedings under the statue. Jurisdiction of the United States District Court in California, or elsewhere, is exhausted.

On another ground the power of the Tugboat Company to dismiss a limitation proceeding which has advanced so far as the proceeding in California may well be questioned. It is to be borne in mind that a petitioner in limitation proceeding is a hybrid—the characteristics of a defendant predominating over those of a plaintiff. In the case of *The Titanic,* 225 F. 747, where on prohibition to the United States District Court the Circuit Court of Appeals for the Second Circuit upheld the right of the trial court to permit damage claimants to withdraw their claims filed in the limitation proceeding, the court said (p. 748):

> "We do not think the action of the Oceanic Steam Navigation Company in filing the petition for limitation places these claimants in the position of defendants and therefore in a position where they cannot withdraw their claim. Facts, not theories, should determine the issue, and, as we have shown, the fact is that the claimants are endeavoring to collect of the Oceanic Company damages

> sustained by reason of its alleged negligence. On that issue they hold the affirmative and, no matter what name may be given them, are entitled to withdraw the claims if they see fit to do so."

The necessary complement of this proposition is that the petitioner in the limitation proceeding is *pro tanto* a defendant. Not only is he a defendant, but he is such by his own voluntary action. It does not lie in his mouth to say that he may not succeed in establishing that he was without privity or knowledge of the disaster so as to entitle him to limitation of liability. He has turned over his vessel to the court and invited the world to assert their rights to participate in that asset and litigate their claims against him and that asset. *Non constat* but that damage claimants may concede petitioner's lack of complicity in the disaster and his right to limit liability. It, therefore, appears that from this aspect the petitioner's posture is wholly that of a defendant, and if a defendant is entitled to dismiss of his own motion any proceeding in which he is such, then indeed is the millenium at hand or Bedlam let loose, dependent upon one's viewpoint, as the case may be.

If the claim of the Hammond Lumber Company in its final form in the amended complaint, for $110,-983.13, with the mere suggestion in a brief that to afford the Lumber Company complete indemnity interest should be added thereto, although the law says it should not, is to be regarded as a *new* claim, and if (as we believe improper), the interest is a part of the claim for purposes of determining jurisdiction, then the Tug-

boat Company should have caused to be issued a citation to compel us to file this new claim in the existing limitation proceeding in San Francisco, and against the fund created therein, and enjoined the further prosecution of the action pending in the State court. The California District Court would of course have denied the Lumber Company any such relief because, as we have shown, the fund there, on its own theory, exceeded the enlarged claim.

That the District Court in admiralty has the powers of a court in equity for the purposes of fully accomplishing the relief created by the limitation statutes, appears from Judge Gilbert's decision in *Oregon Navigation Co. v. Balfour,* 90 Fed. 298:

> "In re Morrison, 147 U. S. 14; 13 Sup. Ct. 246, it was held that the 'proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered to a trustee, but is an equitable action'. In Providence & N. Y. SS. Co. v. Hill Mfg. Co., 109 U. S. 578; 3 Sup. Ct. 379, 617, it was said that the object and scheme of the statute are to prevent a multiplicity of suits. The proceeding, therefore, is a suit in equity, in admiralty, not to subject property to liens, nor to obtain a personal decree against the owners of the property, but to administer the property which has been invested in the venture through which the injury has occurred, and upon which admiralty liens may have attached therefor, and to apportion it among those who might, on account of the injury, have enforced admiralty liens against the property or have obtained personal judgments against its owner. To accomplish these results and to avoid the dilemma of inferring that congress has passed a law which is incapable of execution, it must be held that the powers of the admiralty in such equitable proceeding are as extensive, and its remedies are as effective, as are the

powers and remedies of a court of chancery where its jurisdiction is invoked in an equitable proceeding."

Or. Ry. & Nav. Co. v. Balfour, 90 Fed. 295 at 298.

Judge Ross, in an earlier decision of this court, on the nature of the proceeding, says:

"The barge Columbia, in respect to which the petitioners sought to limit their liability, not having been surrendered to a trustee, as provided for in section 4285 of the Revised Statutes, the proceeding taken was not a proceeding *in rem,* but a suit in equity (In re Morrison, 147 U. S. 14-34; 13 Sup. Ct. 246); and a suit in equity not only for the purpose of limiting the liability of the petitioners, if any liability should be found to exist, but as has been shown, also to have it judicially determined that no liability at all attached to the petitioners by reason of the injuries, damage, and loss mentioned in the petition. The monition issued and published in pursuance of the petition commanded all persons having claims growing out of the matters therein alleged to appear and intervene *pro interesse suo.* 13 Wall. 104; 109 U. S. 591; 3 Sup. Ct. 379, 617. All persons having such a claim or claims are forced by the provisions of the law into the one suit; but when they come into it, each is entitled to set up the facts relied upon by him to make good his claim. Obviously they may, and often do, rest upon separate and distinct grounds. It was so in the present case."

The Columbia, 73 Fed. 226 at 234.

Certainly, under no theory, is the second limitation proceeding in Oregon justifiable, and any new question legal or equitable should be litigated in the first.

It is submitted, that if the right to increase the claim to above $115,000.00 by the inclusion of interest (which was not done) was an open question, it should have been thrashed out in the pending limitation proceeding in California.

As indicated on the oral argument, the question of estoppel as between the parties hereto resulting from the steps taken by each in the limitation proceeding in the Northern District of California, can hardly fail to suggest itself to the court. We are satisfied that power remained in the United States District Court for the Northern District of California in the limitation proceeding there pending to enable the Tugboat Company to derive all the benefits conferred under the Revised Statutes providing for limitation of liability, in the event Lumber Company had attempted to creat a situation which, had it existed while it was a party to the limitation proceeding in California, would have resulted in its retention in that proceeding. Nevertheless, as an appendix to this brief and merely for the sake of rounding out the argument (for neither the Lumber Company nor the Tugboat Company has ever attempted to work out the relief of a shipowner, who might perhaps be deprived of some of the benefits flowing from said Revised Statutes, in terms of estoppel), we set forth our observations in reference thereto, should the court, of its own motion, deem it of sufficient interest to examine the subject from that viewpoint.

VI.

THIS COURT HAS NO JURISDICTION TO CONSIDER AN APPEAL WHICH PRESENTS SOLELY FOR DETERMINATION A DENIAL BY A UNITED STATES DISTRICT COURT OF ITS JURISDICTION TO ENTERTAIN AND DETERMINE A PETITION FOR LIMITATION OF LIABILITY.

When the Lumber Company sought from your Honors a writ of prohibition to stay the further prosecution of this cause which your Honors are now asked by appellant to determine on the appeal, your Honors refused to issue the writ, among other reasons (240 Fed. 924, 928) on the following grounds:

> "Again, the only ground alleged for prohibition is the lack of jurisdiction of the court below, not jurisdiction of the parties, but jurisdiction of the subject-matter. On that question of the jurisdiction alone there would be no appeal to this court. The appeal would necessarily be to the Supreme Court. In United States v. Sessions, 205 Fed. 502; 123 C. C. A. 570, the Circuit Court of Appeals for the Sixth Circuit said:
>
> " 'This court has no power, even on error or appeal, to review a decision of the District Court which involves only a question of the jurisdiction of that court. The remedy lies exclusively in the Supreme Court.'
>
> "That was a case in which mandamus was sought to require a District Judge to dismiss a certain cause from the District Court and remand it to the state court. The Circuit Court of Appeals, in denying its jurisdiction, said:
>
> " 'The right in this court to issue writs of mandamus is incidental to other powers expressly conferred; and it need not be said that, since the power to review simply a question of jurisdiction in the court below does not reside in this court, there is nothing to which the right to issue such a writ can be said to be an incident.' "

The lower court unquestionably dismissed the petition for limitation herein on the ground that it was without jurisdiction in the premises.

As noted in the "Statement of the Case" at the beginning of this brief, upon the hearing of the motion appellant moved the court to strike said motion from the cause on the ground that it came too late (Tr. 6). In his opinion, in disposing of this objection, Judge Bean (Tr. 86) said:

> "Objections to the consideration of the motion to dissolve the injunction and dismiss the proceedings will be overruled. The motion goes to the jurisdiction of the court over the subject-matter and was not waived by a general appearance."

Judge Bean then says:

> "The exceptions and motion will be allowed and the petition dismissed" * * *.

Therefore, whether we are in fact considering a rightful assumption of jurisdiction of the United States District Court and the alleged erroneous determination of the questions of law arising subsequent to the assumption of such jurisdiction, or whether the whole question is one of jurisdiction from beginning to end, it is at least clear that Judge Bean entertained the belief that the matter was wholly jurisdictional and acted accordingly.

In this connection see also Assignment of Error 13 (Tr. 93) which reads as follows:

> "The District Court erred in not holding and deciding that it had jurisdiction to proceed to a trial of the issues raised by the petition, claim and answer of Hammond Lumber Company."

Apparently in determining whether the Circuit Court of Appeals or the Supreme Court has jurisdiction of an

appeal, not only is it proper to consider whether in fact the jurisdiction of the District Court as a Federal Court is involved, but even if it is not involved and the District Court itself declined to exercise jurisdiction because *it* thought—even erroneously—that it had no jurisdiction, the ruling of the District Court so made is subject to review in the Supreme Court of the United States and not in the Circuit Court of Appeals.

Thus in *Lehigh Valley Railroad Co. v. Cornell Steamboat Company,* 218 U. S. 264; 54 L. Ed. 1039, the question was as to the jurisdiction of the United States District Court as an Admiralty Court of a libel to enforce contribution arising out of a group of collisions. Libel was dismissed on the ground that the District Court, sitting as a Court of Admiralty, had no jurisdiction to enforce contribution between the parties *on the facts.*

In sustaining the direct appellate jurisdiction of the United States Supreme Court, Mr. Justice Holmes says:

> "The first question is whether this court has jurisdiction of the appeal. It is said that the dismissal of the libel, although expressed to be for want of jurisdiction, really is on the merits, because payment of a judgment at common law is not a ground for contribution from a joint wrongdoer, not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits (Fauntleroy v. Lum, 210 U. S. 230, 235, 52 L. ed. 1039, 1041; 28 Sup. Ct. Rep. 641) and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim, it is of a kind that the admiralty not only ought not to enforce, but has no power to enforce. At all events, the form of the decree must be taken to express the meaning of the judge. If the decree was founded,

> as it purports to be, on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For all admiralty jurisdiction belongs to courts of the United States as such, and therefore the denial of jurisdiction brings the appeal within the established rule. See The Jefferson, 215 U. S. 130, 138; 54 L. ed. 125, 128; 30 Sup. Ct. Rep. 54."

Of course, it will not be contended that proceedings under the Act of Congress to Limit the Liability of Shipowners, are other than admiralty cases within the meaning of Judiciary Act of March 3, 1891, Section 5. This has already been adjudged.

> *Oregon Railway & Navigation Company v. Balfour,* 179 U. S. 55; 45 L. Ed. 82.

In the case of

> *The Annie Faxon,* 87 Fed. 961,

decided by this court, by Judges Gilbert, Ross and Morrow, it was held by this court that where the substantial and only question presented is as to the power of the District Court to render a personal judgment or decree, in a limitation of liability proceeding, a question of jurisdiction was clearly presented which this court is not authorized to review and the appeal was, therefore, dismissed at the appellant's costs.

In this case, the boiler of the steamer "Annie Faxon" had exploded, killing both passengers and members of the crew. The District Court held that the owners of the vessel were entitled to limit their liability with respect to the claims of all the persons injured and the decree was entered accordingly. An appeal was taken to this court which upheld the limitation of liability in respect of the claims of the employees, but further held

that the claims of the passengers should not be so limited as their right of action arose out of a federal statute concerning the inspection of boilers which right of action the court held was not subject to limitation under the Revised Statutes enacted in that behalf. The cause was remanded for further proceedings and judgments aggregating $40,000.00 were awarded by the District Court in favor of the passengers and the appeal in question was thereupon prosecuted to this court with the result above noted.

So where the United States District Court for the Northern District of California held that it had jurisdiction to entertain further steps in a salvage suit after a limitation proceeding had been instituted, which involved the disaster in connection with which the salvage services were rendered, the appeal was taken directly to the Supreme Court of the United States and a reversal secured.

Metropolitan Redwood Company v. Doe, 223 U. S. 365.

On the argument herein as to whether this court had jurisdiction to entertain this appeal, counsel for the Tugboat Company in reply thereto merely stated that in his judgment Judge Bean had decided something in addition to a jurisdictional question and that "something" was involved in the present appeal. As we have not been enlightened as to what that "something" is, we are rather at a disadvantage in discussing its characteristics, whether jurisdictional or otherwise. We would invite the attention of this court to the fact that Judge Bean was not called upon to decide between con-

flicting facts—the affidavit in support of the motion to dismiss not being controverted in any way. Nor for that matter do we understand that Judge Bean's final action in dismissing the limitation proceeding would have been any the less a denial by him of the jurisdiction of his court to entertain same, even though he had been required to make and had made findings on conflicting facts.

Hernden-Carter Co. v. Norris, 224 U. S. 496; 56 L. Ed. 857;

United States v. Congress Co., 222 U. S. 199; 56 L. Ed. 163.

As will have been noted from the language of Mr. Justice Holmes in *Lehigh Valley Railroad Co. v. Cornell Steamboat Company,* supra, it is pointed out that inasmuch as all admiralty jurisdiction belongs to courts of the United States as such, in considering whether a jurisdictional question is one which involves the jurisdiction of the Federal courts as such, we are not at all embarrassed by the question which has so often been presented on the law and equity sides of the Federal courts as to whether in a given case the jurisdiction of the court as a Federal court is involved, or whether it is but a question of jurisdiction generally, i. e. a matter which might pertain to the jurisdiction of any tribunal. An illustration of what we mean will be found in the case of

Fore River Shipbuilding Company v. Hagg, 219 U. S. 175; 55 L. Ed. 163,

where the Supreme Court denied that the jurisdiction of a Federal Circuit Court was so involved as to sus-

tain an appeal to the Supreme Court of the United States where the question was whether, under general principles of jurisprudence which would have been applicable alike had the action been brought in a State court, the court should enforce a State statute whose character as a penal statute or otherwise, and, therefore, its enforceability in courts other than those of the forum, was in controversy.

So the objection that complainants had not by their appeal made a case properly cognizable in a court of equity is one which does not put in issue the jurisdiction of a Federal Circuit Court so as to give the Supreme Court appellate jurisdiction to review its decree.

World's Columbian Exposition v. United States, 56 Fed. 654;

Smith v. McKay, 161 U. S. 355; 40 L. Ed. 731.

So a decision of a Federal Circuit Court dismissing a bill on the ground that the remedy was at law and not in equity, does not involve the jurisdiction of that court as a court of the United States, so as to warrant a review of its decision by the Supreme Court of the United States.

Blythe v. Hinckley, 173 U. S. 501; 43 L. Ed. 783.

In considering the question of jurisdiction for the purpose of admiralty appeals, we, therefore, are not vexed by the intermingling of the two forms of jurisdiction, one of which makes the proper appellate tribunal the Supreme Court of the United States, and the other, the Circuit Court of Appeals.

As Mr. Justice Holmes has pointed out,

> "all admiralty jurisdiction belongs to courts of the United States as such and, therefore, the denial of jurisdiction brings the appeal within the established rule".

The same thought is developed and its limitations indicated in

> *Lamar v. United States,* 240 U. S. 60, 64; 60 L. Ed. 526, 528.

Under the Supreme Court decisions just noted and that of this court in the *"Annie Faxon"* supra, for our own part we find it difficult to convince ourselves that this court has jurisdiction of this appeal.

It may at first blush seem strange that this court should have entertained an appeal taken by the Tugboat Company (218 Fed. 161) from Judge Dooling's decree (212 Fed. 455) dismissing the California limitation proceeding as to the Lumber Company, but, in the first place, it is to be observed that Judge Dooling did not dismiss the proceeding. Indeed he expressly *retained jurisdiction thereof* (Tr. 79, 81), so that rightly or wrongly the question presented to this court to determine was whether he had acted merely erroneously in a proceeding over which he had assumed and still retained jurisdiction. In this connection Judge Dooling (Tr. 79-80) said:

> "Under the peculiar circumstances of the present proceedings I am of the opinion that petitioner's protection does not require that this court should further restrain claimant from prosecuting its action in the State Court, and that as to said claimant the proceedings should be dismissed. The same result might perhaps be attained by dissolving the restraining order in so far as it applies to claimant, but I am satisfied that as claimant has moved to dismiss, instead of for a dissolu-

> tion of the restraining order, its motion should be granted. The proceeding as to claimant is, therefore, dismissed. The court, however, will retain jurisdiction of the proceedings for the protection of petitioner against any other possible claims."

In the second place, in the instant appeal, Judge Bean himself characterized the questions raised by the motion (which included everything brought up by the exceptions and more besides) as going to the jurisdiction of the subject matter, and while invited by the prayer of the motion to merely dissolve the injunction against Hammond Lumber Company, or to dismiss the proceeding as to Hammond Lumber Company, he chose the third alternative and dismissed the entire limitation proceeding.

Finally, apart from what the personal views of the learned trial judge may have been, as evidenced by his opinion and decree, we submit that the two grounds specially mentioned by him in his memorandum opinion for declining to entertain the proceeding, namely, (1) the pendency of the California proceeding which, under the express terms of R. S. 4285, ousted all other courts of jurisdiction and (2) the finding that the Lumber Company had made no claim in excess of the fund—went to the very essence of the jurisdiction of the lower court and that the lower court rightly dismissed the proceeding as one over which it was without jurisdiction.

In conclusion, if this court should hold that it has jurisdiction in the premises, we urge, for the reasons

hereinbefore set forth, that the decree should be affirmed.

Dated, San Francisco,
February 25, 1918.

Respectfully submitted,

W. S. Burnett,
William Denman,
G. C. Fulton,
Proctors for Appellee.

(APPENDIX FOLLOWS.)

APPENDIX.

ASSUMING, FOR THE SAKE OF ARGUMENT, THAT HAMMOND LUMBER COMPANY HAS NOW MADE A DEMAND IN EXCESS OF THE FUND ADJUDICATED IN THE CALIFORNIA PROCEEDING, IT MAY BE IT IS ESTOPPED FROM ASSERTING ITS CLAIM TO BE ANY GREATER THAN THE ADJUDICATED FUND.

In our brief, under Topic V, we have given consideration to the nature of the proceeding to limit liability, and concluded that the proceeding brought in the Northern District of California was exclusive as against that instituted in the District of Oregon.

The exclusive and once-and-for-all character of the proceeding to limit liability staying as it does all other tribunals, even the United States District Court itself, where independent libel proceedings involving the disaster have been brought and are pending (*Metropolitan Redwood Lumber Co. v. Doe,* 223 U. S. 365 at 371) suggests that possibly there may have been an adjudication between the parties hereto in that proceeding, which estops each as between themselves, namely: Hammond Lumber Company would be estopped to assert its claim was any greater than the fund then adjudicated, and the Tugboat Company would be estopped to assert that the fund was any less than that adjudicated.

That the estoppel should run against Hammond Lumber Company only to the extent that it is debarred from asserting a claim no greater than the fund, and that Hammond Lumber Company is not limited to the assertion of its claim in the amount presented in that pro-

ceeding, namely, $71,249.90, *with interest,* is proper when it is borne in mind that no issue was ever tried concerning the amount of the claim, and an amendment to it at any time would have been permitted by that court so long as the amount demanded did not exceed the fund.

Interest upon said sum of $71,249.90 at the rate of 6% per annum until September 9, 1917 (the sixth anniversary of the disaster) would amount to the sum of $25,650.00. So even if Hammond Lumber Company were estopped from asserting its claim in an amount in excess of that presented in the California limitation proceeding, on the 9th day of September last the amount of recovery permissible would have been $96,899.00.

As to the size of the fund, it is proper that the Tugboat Company should be estopped from asserting a fund any less than that adjudicated in the California limitation proceeding. It will be recalled that the appraised value of the tugs was arrived at upon a hearing at which Hammond Lumber Company was cited to appear, was present and offered testimony thereat on the issues as to the value of the tugs, and an order was made by the Commissioner and approved by the court establishing the value of the tugs, and bonds were ordered filed in pursuance thereof, which bonds were by the court made interest bearing from the date of the disaster. All this constituted a final adjudication and determination by the court as to the amount of the fund. With the fund thus in court carrying such interest, petitioner proceeded to publish the monition inviting all the world to present their claims and participate therein, and stayed proceedings thereon in any other tribunal.

We submit that the Tugboat Company should be estopped from at any time asserting that the fund is less than as so adjudicated.

Be this as it may, the extent of the estoppel as to Hammond Lumber Company and as to the Shipowners & Merchants Tugboat Company is a question for the Circuit Court of Clatsop County to determine, when if and as Hammond Lumber Company asserts a claim in conflict with that presented by it in the limitation proceeding in California, and when if and as Shipowners and Merchants Tugboat Company, by proper pleadings in its behalf, presents to the said Circuit Court of Clatsop County, the facts out of which such estoppel arises.